Filed 12/19/08 In re Mariah C. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re MARIAH C., a Person Coming Under the Juvenile Court Law.	B208324 (Los Angeles County Super. Ct. No. CK63077)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Petitioner and Respondent, v. LATORIA C., Objector and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Jacqueline Lewis, Juvenile Court Referee. Affirmed.

Joseph D. Mackenzie, under appointment by the Court of Appeal, for Objector and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Kirstin J. Andreasen, Associate County Counsel, for Petitioner and Respondent.

I.

INTRODUCTION

Latoria C. (Mother) appeals from the juvenile court's order terminating her parental rights to her daughter, Mariah C. Mother suffers from schizophrenia and bipolar disorder and has anger management problems, along with mental retardation. She contends the dependency court erred in failing to appoint, sua sponte, a guardian ad litem for her. We affirm.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The initial facts and detention.*

Mother and Father are the parents of Mariah, who is presently approximately three years old.[1] Mother suffers from schizophrenia and bipolar disorder. She has major depressive disorder, anger problems, and has been involved in numerous incidents of domestic violence with Father. For example, Father had marks, bruises, and scratches as a result of an altercation with Mother. Additionally, on one occasion Mother bit Father's hand.

Father is developmentally disabled. Mother and Father were receiving ongoing, weekly, assistance with activities of daily living from a number of providers. They both received Supplemental Security Income (SSI) and both had been diagnosed with mild mental retardation.

When Mother discovered she was pregnant, she discontinued her psychotropic medications, exacerbating her problems. After Mariah was born, she was placed on other medications, but her anger outbursts seemed to be more frequent. Later, as discussed infra, Mother's psychotropic medicines were eliminated.

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[1] Because Father is not a party to this appeal, many facts about his participation in these proceedings and other facts relating to him have been omitted.

On April 13, 2006, Father took Mariah to the hospital and reported that Mother shook the child vigorously. Father informed a social worker from the Los Angeles County Department of Children and Family Services (DCFS, or the Department) that he and Mother argued and Mother was physically and verbally abusive to him. The physician who examined Mariah said she was okay and a CAT Scan was normal. Both Mother and Father stated it was difficult taking care of Mariah. Mariah's paternal great aunt, Rosemary P., reported that on more than three occasions the parents forgot to feed Mariah. Rosemary P. also stated that Father would take the baby out of the home when Mother got out of control.

The next day, Mariah was detained in Rosemary P.'s home, and on April 19, 2006, the Department filed a dependency petition pursuant to Welfare and Institutions Code section 300.[2] The petition alleged Mother and Father had a history of domestic violence, the parents failed to provide Mariah with the basic necessities of life, and Mother had a history of chronic mental illness and demonstrated mental and emotional problems, all of which endangered Mariah and placed her at risk of serious harm.

A detention hearing was held on April 19, 2006. An attorney was appointed to represent Mother. Mother's counsel reported to the dependency court that Mother stated she had been having some issues with depression, had not taken her medicine, and had acted out of frustration. The court found that Father was the presumed father and detained Mariah. The court ordered the Department to provide both parents with reunification services and monitored visitation.

B. *The adjudication.*

On May 16, 2006, Mother, who was represented, appeared for a jurisdictional hearing. The hearing was continued to June 6, 2006, and then to June 7, 2006.

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[2] Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

On June 6, 2006, Mother admitted to DCFS she had pushed and scratched Father, by accident. Mother stated she did not know her own current diagnosis. She also admitted failing to take her medications and shaking Mariah, but "not hard. . . ." The parents were cooperative with DCFS and committed to reunifying with Mariah. Mother stated she had participated in special education programs, graduated from high school, and participated in some community college courses. She was participating in parenting education and an anger management course, and receiving services to assist with independent living skills. Mother regularly visited Mariah and called Rosemary P. to inquire about the child. Father downplayed the domestic violence, saying Mother had only pushed him and the scratch was nothing serious.

On June 7, 2006, Mother was present in court, along with her counsel. Father waived his trial rights. The case proceeded by way of adjudication with regard to Mother. The juvenile court sustained an amended petition and found Mariah would be at risk in the parents' custody. The court declared Mariah a dependent, ordered reunification services and monitored visitation, and placed Mariah with Rosemary P. The court ordered Mother to attend individual counseling, parenting classes, psychiatric counseling, and to take her psychotropic medications.

Thereafter, an independent living skills worker reported that Mother had difficulty controlling her anger, and Mother often hit Father. During the parents' visits with Mariah, they often yelled and argued.

C. *The reunification period.*

In its September 6, 2006, report, the Department reported the following to the court at a progress hearing. Mother, who appeared with counsel, wanted to regain custody of her child. Mariah continued to live with Rosemary P. The parents continued to visit Mariah, although Mother was physically abusive to Father during the visits. There were indications that outside the visitation setting, Mother was short-tempered with Father, whom she hit. Mother expressed anger

towards Father and Rosemary P. On one occasion, a neighbor telephoned the police because of a disturbance between the parents. Mother was participating in anger management classes and she saw her psychiatrist monthly. There were reports that while Mother was an excellent housekeeper, she was reluctant and hesitant to care for Mariah at home.

At the six-month review hearing on November 9, 2006, the parents appeared with their respective counsel. Mother expressed an interest in having Mariah returned to her. DCFS recommended that Mariah remain with Rosemary P. The court ordered continuation of reunification services.

Mother continued to visit Mariah weekly, and then twice weekly. She also continued to take a number of medications and participate in a number of programs and counseling. In May 2007, a counselor at a service center reported two recent incidents of domestic violence. One incident had occurred in March 2007; it resulted in Father being taken to the hospital because Mother scratched him in the eye. The counselor recommended Mariah not be returned to her parents.

Mother and her counsel appeared on May 7, 2007, for a 12-month review hearing (§ 366.21, subd. (f)). The Department's status review report for the hearing reported the two incidents of domestic violence and that Mother was partially abiding by the court ordered programs and counseling, and Mother was visiting Mariah. DCFS reported that Mother was motivated to resolve the issues that had brought her to the attention of the Department. DCFS also reported that Rosemary P. was willing to adopt Mariah if she was not returned to her parents. Those who provided services to the parents believed it would be dangerous to return Mariah to them. The hearing was continued.

At the May 30, 2007, continued review hearing (§ 366.21, subd. (f)), the parents appeared with counsel. The dependency court found that the parents had made partial progress toward alleviating or mitigating the causes which necessitated Mariah's placement. Mother submitted upon the Department's

recommendation that additional services be provided. Although expressing some reservations, the court found upon stipulation of the parties, that there was a substantial probability Mariah may be returned to her parents by the 18-month date, and the court continued reunification services. The court warned, however, that if Mother could not control her anger, Father might have to choose between raising Mariah and being with Mother. The matter was continued.

On August 28, 2007, a Team Decision Making (TDM) meeting was held. The parents attended, as did a number of relatives and professionals. Five professionals (a developmental therapist, the parents' counselor, the Harbor Regional Center supervisor, a supervisor from Birth and Family Services, and a case manager) all expressed concerns about the possibility of Mariah being returned to her parents, who had life-long challenges. Most explicitly they stated it would be dangerous for that to occur. While acknowledging the parents' concerns and desires to parent, these professionals did not believe Mother and Father could care for Mariah. In contrast, Mother's counselor who taught life skills, believed Mother and Father could take care of Mariah. Rosemary P. and Mariah's paternal grandfather were also present at the TDM. Rosemary P. stated that she was willing to adopt Mariah. The paternal grandfather expressed the opinion that Mother and Father could not provide a safe atmosphere for Mariah and begged the parents to allow Rosemary P. to take care of the child. During the TDM, Mother became very upset and loudly expressed her desire to raise Mariah.

DCFS reported in a September 19, 2007, report, that Mother had been taken off her psychotropic medicine because they were complicating a number of physical conditions. DCFS concluded in its report that it was not in Mariah's best interest to be returned to her parents. The Department recommended that the court terminate reunification services and set a hearing to select and implement a permanent plan, pursuant to Section 366.26.

On November 7, 2007, Mother and Father appeared with their counsel for a contested Section 366.22 permanency review hearing. The Department submitted

various reports, with attachments, into evidence. Mother called two witnesses from an organization that provided services in living independently to persons with developmental disabilities. The dependency court found that return of Mariah to her parents would create substantial risk of harm to her not only because of the parents' developmental delays, but because of the domestic violence, Mother's anger management issues, and Mariah's developmental delays. In addition to other events, the court noted that Father had to go to the emergency room after Mother scratched his eye. The court terminated reunification services and referred the matter for a Section 366.26 hearing. The court reminded the parents they had to file an extraordinary writ if they wished review of its order. The court set a selection and implementation hearing pursuant to Section 366.26.

On November 29, 2007, it was reported to the court that the Department had concerns about Mariah's speech and language development, fine and gross motor skills, cognitive and overall development.

D. *Permanency planning and termination of parental rights.*

On December 12, 2007, Mother's attorney appeared at a hearing during which the Department submitted a report on Mariah's progress. Rosemary P. continued to express a desire to adopt Mariah. Upon the request of Mother's counsel, the court urged the Department to involve Mother in Mariah's developmental programs.

On February 27, 2008, a Section 366.26 hearing was held. Mother appeared with counsel. DCFS reported the following. Mariah was doing well. The parents demonstrated little interest in visiting with Mariah after reunification services were terminated. Mother did not call Rosemary P. to inquire about Mariah and did not try to participate in the programs offered to Mariah. The parents continued to have episodes of domestic violence. Mother had not learned to control her anger. For example, it was reported that Mother had hit Father and had broken a table. DCFS recommended that the dependency court terminate

parental rights and free Mariah for adoption. The court continued the hearing for a contested Section 366.26 hearing.

On March 24, 2008, DCFS reported the following. Despite efforts of the social worker, Mother had not visited Mariah. Father had informed the social worker that he had been threatened and assaulted by Mother. Father also reported that Mother had broken objects, resulting in broken glass being all over the house. DCFS recommended termination of parental rights and adoption for Mariah. (Previously, Rosemary P.'s home had received approval.)

A contested Section 366.26 hearing was held on April 24, 2008. Mother was present with her attorney. DCFS reports were submitted into evidence. A DCFS report dated April 24, 2008, indicated that Mariah (who was two years old) was not verbal, babbled and communicated with hand signals. Father's counsel indicated that Father was happy with Rosemary P. becoming Mariah's permanent caretaker. Mother's counsel stated that Mother was "opposed to adoption. She has some concerns about the maternal great aunt's age, 64. This child is only 2, and she would like to be in the child's life at some point in the future." The court made all of the proper findings to terminate parental rights, including that it would be detrimental for Mariah to be returned to her parents. The court found that adoption was appropriate and ordered it as Mariah's permanent plan.

Mother timely appealed. The notice of appeal stated that Mother challenged only the April 24, 2008, order terminating her parental rights. On appeal, Mother contends that the juvenile court abused its discretion and violated her due process rights by failing to appoint a guardian ad litem sua sponte to protect her rights.[3] We affirm.

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[3] Mother also contends that she did not forfeit the right to raise this issue by failing to raise it below. In light of our holding, we need not address Mother's waiver argument.

III.

DISCUSSION

A. *Guardian ad litem and the standard of review.*

Code of Civil Procedure section 372, subdivision (a) provides in part: "When . . . an incompetent person . . . is a party, that person shall appear . . . by . . . a guardian ad litem appointed by the court in which the action or proceeding is pending, or by a judge thereof, in each case. A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to appoint a guardian ad litem to represent the . . . incompetent person . . . ." Code of Civil Procedure section 373, subdivision (c) authorizes a trial court to appoint a guardian ad litem for an incompetent person "on its own motion."[4]

"In a dependency case, a parent who is mentally incompetent must appear by a guardian ad litem appointed by the court. [Citations.]" (*In re James F.* (2008) 42 Cal.4th 901, 910.) When the juvenile court already has knowledge of a parent's incompetency, the court has an obligation to appoint a guardian ad litem sua sponte. (*In re Lisa M.* (1986) 177 Cal.App.3d 915, 919.) "The test is whether the parent has the capacity to understand the nature or consequences of the proceeding and to assist counsel in preparing the case. [Citations.]" (*In re James F., supra,* at p. 910.) In reviewing the juvenile court's actions, the appropriate inquiry on appeal is whether the circumstances as a whole should have alerted the juvenile court that the parent was incapable of understanding the nature or consequences of the proceeding and unable to assist counsel in representing the parent's interests. (*In re Sarah D.* (2001) 87 Cal.App.4th 661, 667-674; *In re R. S.* (1985) 167 Cal.App.3d 946, 979-980.)

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[4] Code of Civil Procedure section 373 provides in part: "When a guardian ad litem is appointed, he or she shall be appointed as follows: [¶] . . . [¶] (c) If an . . . incompetent person is a party to an action or proceeding, upon the application of a relative or friend of such . . . incompetent person, or of any other party to the action or proceeding, or by the court on its own motion."

As we articulated in *In re Ronell A.* (1995) 44 Cal.App.4th 1352 (*Ronell A.*), the standard of review for determining whether the juvenile court erred by failing to act, sua sponte, to determine whether a guardian ad litem should have been appointed for mother is abuse of discretion. (*Id.* at p. 1368; *In re R. S., supra*, 167 Cal.App.3d at p. 979.)

B. *The dependency court did not abuse its discretion.*

There are a number of cases that have addressed situations akin to the one before us.

The court in *In re R. S., supra,* 167 Cal.App.3d 946 acknowledged the mother appearing before it suffered from mild mental retardation and from a personality disorder. (*Id.* at p. 979.) However, even though the mother's abilities were limited, the court held that she was still able to understand the nature of the proceedings and to assist her counsel in representing her interests. Thus, the appellate court held that the lower court had not abused its discretion in failing to appoint a guardian ad litem sua sponte. (*Id.* at pp. 979-980.)

In *In re Sara D., supra,* 87 Cal.App.4th 661, there were indications that the mother suffered fragmented thoughts, which made it difficult for her to stay focused, and suffered from psychological problems, including major depression, posttraumatic stress disorder with chemical dependency, and borderline personality disorder. The appellate court held that this evidence was insufficient to support a conclusion that she did not understand the nature of the proceedings and unable to assist counsel. (*Id.* at p. 674.)

In *Ronell A.* the father had the mental capacity of a 12-year-old child and had been diagnosed as schizophrenic characterized by unpredictable violence and substance abuse. He received disability payments and had been placed in a rehabilitation center for mentally ill inmates and was considered barely able to care for himself. (*Ronell A., supra,* 44 Cal.App.4th at p. 358.) Yet, the evidence before us clearly indicated that the juvenile court was aware of the father's condition and we held that the father was able to understand and participate in the

court proceedings. (*Id.* at pp. 1367-1368.) We held that the juvenile court had not abused its discretion in failing to appoint a guardian ad litem sua sponte. (*Ibid.*; compare with *In re Lisa M., supra,* 177 Cal.App.3d 915 [court abuses its discretion when it finds a mother incapable of understanding the nature of juvenile proceedings, but fails to appoint a guardian ad litem].)

Here, the record discloses no abuse of discretion by the juvenile court. Although Mother had major developmental, mental and emotional impairments, there is nothing to indicate she did not have the capacity to understand the nature or consequences of the proceedings. The juvenile court was aware of Mother's conditions and limited abilities, as this information had been presented in numerous reports prepared by DCFS and numerous service providers. The court was also cognizant that Mother was receiving medical and psychiatric treatment along with services provided to developmentally disabled adults. Yet, the juvenile court made no finding nor gave any indication that Mother was unable to participate meaningfully in those proceedings.

Further, there is no evidence in the record that Mother, who represented that she had taken some community college classes, did not or could not communicate with or assist her counsel. Mother's counsel did not express any concerns regarding Mother's competence or Mother's ability to assist in preparing the case or representing her interests, nor does Mother contend that counsel was ineffective.[5] There is nothing in the record to suggest that Mother lacked the capacity to discuss the case with her counsel. Rather, Mother provided her counsel with information from the service providers and made her wishes known to DCFS and the court. Mother's counsel appeared at all hearings. At the April 24, 2008, hearing at which the juvenile court ordered adoption as the

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[5] We note that throughout the proceedings, Mother was represented by a number of different attorneys. Although Mother alludes to actions her counsel could have taken in the trial court (such as calling witnesses or submitting documentary evidence), Mother has not suggested that any of the attorneys was ineffective.

permanent plan, Mother's counsel represented Mother's position as counsel informed the court that Mother was opposed to adoption and had concerns that Rosemary P., age 64, could not care for Mariah.

Thus, the juvenile court did not abuse its discretion by not exercising its authority to appoint a guardian ad litem for Mother.

IV.

DISPOSITION

The order terminating parental rights is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.